

Book Review

Competition Policy and the Control of Buyer Power: A Global Issue

by Peter C. Carstensen

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Conventional thinking about competition policy, whether in developed or emerging economies, focuses largely on harm to consumers and to market dynamics resulting from the abuse of seller power. In his prize-winning book, *Competition Policy and the Control of Buyer Power: A Global Issue*,¹ Professor Peter Carstensen of Wisconsin Law School, challenges this thinking and offers the more provocative view that the oft-ignored abuse of buyer power poses at least as grave a threat to the competitive process as the abuse of seller power. He argues in fact that the exercise of buyer power is more dangerous not only because it is pervasive but also because it is easily ignored or justified on the basis that it generates lower prices and therefore enhances consumer welfare.

Professor Carstensen's interest in buyer power is not new. In more than forty years as an antitrust and competition scholar,² he has explored several different facets of buyer power whilst focusing particularly on the role of buyer power in the decline of the American farming sector.³ In this most recent book, Carstensen takes his inquiry into buyer power several notches higher: he explores the general concept of buyer power and links it with the goals of competition law and policy; he examines the impact on the competitive process and the reasons why it has remained under-explored. Finally, he suggests strategies for controlling and regulating buyer power. In doing so, he evaluates the unique characteristics of the buying side of the market, the range of responses of competition agencies, courts and scholars to buyer power emerging around the world and highlights the market structures and contexts in which buyer power is most likely to have adverse effects on the competitive process.

The result is a book which not only plugs a significant gap in competition scholarship but is also readable and interesting. Beyond the obvious audience of competition academics and practitioners seeking to explore the nature of buyer power, the book is likely to be of tremendous interest to future scholars who are keen to arrive at a more holistic understanding of competition law and policy and to re-align it with its broader (and, in Carstensen's view, more intrinsic) goal of safeguarding the competitive process, rather than the narrowly defined focus on consumer

¹ The book received the Jerry S. Cohen Memorial Fund Writing Award for best antitrust book of 2017. <https://www.cohenmilstein.com/update/recipients-honored-16th-annual-jerry-s-cohen-award-antitrust-scholarship> (accessed 12 April 2019).

² <https://law.wisc.edu/profiles/pccarste@wisc.edu> (accessed 12 April 2019).

³ See for instance, Peter C. Carstensen, 'Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy', 2000 Wis. L. Rev. 531(2000). Other articles dealing with buyer power include, Peter C. Carstensen, 'Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue', 14 U. Pa. J. Bus. L. 775 (2012); and Peter C. Carstensen, 'Buyer Cartels versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy', 1 Wm. & Mary Bus. L. Rev. 1(2010).

welfare. It is a ground-breaking, authoritative text that cannot be recommended highly enough for inclusion in any competition law library.

Professor Carstensen's exploration of buyer power spans nine compact chapters: chapter 1 sets out the scope of the challenge that buyer power poses to conventional competition policy; chapter two locates buyer power within the goals of competition policy; chapter three defines buyer power and identifies tools for its measurement particularly in input markets and retail of branded goods; chapter four discusses potential harms of the existence and abuse of buyer power; chapter five evaluates the adequacy of competition policy for addressing unilateral conduct by buyers; chapter six examines market regulation and other strategies to remedy the abuse of buyer power; chapter seven analyses competition policy for buyer cartels and buying groups; chapter eight examines the possibility of controlling the creation of buyer power through merger policy; chapter nine concludes.

At the very outset Carstensen clarifies that the risks of buyer power are not limited to markets in which there are many producers and few buyers but in fact exist in *any* buying market in which a buyer exercises substantial power. These may be agricultural markets, in which large domestic or multinational food processing companies buy directly from farmers, or retail markets in which large outlets purchase from manufacturers of branded goods. Although he cites several examples of buyers exercising power in the retail sector Carstensen is of the view that the most harmful exercise of such power occurs in the grocery retail sector: the rapid expansion of grocery supermarkets combined with significant mergers may have created two or three choices for consumers but on the buying side, these have resulted in highly concentrated markets, which allow buyers to exercise considerable power over their suppliers.

More than the prevalence of buyer power, Carstensen is concerned with the harm it causes. For instance, he argues that increasing concentration in the grocery retail sector in America (and indeed worldwide) allows retailers to demand and obtain lower prices from processors, who in turn drive down the prices they pay for farm inputs. This leads to farmers getting less and less of the food dollar and the overall decline of farm incomes worldwide. He notes that a similar downward trend is observed beyond the agricultural sector when even profitable employers drive down the wages of their employees in order to offer greater discounts to the powerful buyers they supply. This effect is magnified in the case of developing countries, where global buyers use their power to drive down prices to the point that employers are unable to pay adequate wages or invest in a safe working environment.

According to Carstensen, buyer power is damaging not only for the harm it causes to individuals but also for the long-term havoc it wreaks on entire communities. He argues that to the extent exercise of buyer power leads producers to be undercompensated, it reduces their ability to participate in the economy. He also debunks the argument that this leads to lower prices for consumers arguing that benefit to consumers only follows if the buyer reduces the prices of its output. He further argues that the transfer of wealth from the producer/supplier to the buyer, leads to society suffering a net loss due to one sector (producers) receiving less than its reasonable share of compensation for the value it creates. This harm is even more aggravated in an international setting where the loss is suffered by the exporting economy which is too remote to participate in any benefit that might accrue to the abusive buyer, its employees and customers.

After establishing that the exercise of buyer power causes harm to competitive process by the exploitation and exclusion of producers, Carstensen evaluates the existing and potential competition policies to evaluate their adequacy for addressing abusive unilateral conduct by

dominant buyers. He recognises, however, that defining standards for judging such conduct and prescribing remedies for it is problematic and poses a considerable challenge not only to the conceptual framework of competition law and policy but also to its institutional framework. He is of the view that it may be easier to prevent the creation of buyer power rather than to regulate it after it has come into existence and therefore, recommends that competition policy analysis should evaluate the potential for direct remedies that focus as much on increasing the potential for entry into the buying side of the market as on protecting producers from undue exploitation.

Carstensen makes a convincing case for addressing buyer power in devising competition policy by anchoring it firmly in competition policy and its primary goal of preserving the competitive process. He dispels the view that risks of buyer power are limited to contexts in which there are many producers and only one or a few buyers and establishes through painstaking analysis that the risks of buyer power are likely to exist in any buying market in which a buyer has substantial power.⁴ Most importantly, he underscores the transnational significance of buyer power: the existence and abuse of buyer power often reach across countries so that harms occurring in one nation have their origin in another.

Whilst he documents the growing public awareness regarding the harm buyer power causes to the competitive process and catalogues regulatory responses in competition regimes as diverse as EU, US, Japan, Korea and China he emphasizes that buyer power is not easily corrected by market processes alone. He warns that conduct-oriented rules based on conventional competition policy are likely to be of only limited utility in ameliorating the harms arising from abuse of buyer power and detailed regulation of buyer conduct can itself become a threat to the critical dynamics of the competitive process. In his view, robust, consistent and globally comprehensive enforcement policies with respect to mergers and buying groups are the best way to create and sustain a workably competitive buying market.

⁴ Defining buyer power to include not only monopsony but also bargaining power is now increasingly recognised. For its application in the EU context, see Ignacio Herrera Anchustegui *Buyer Power in EU Competition Law* (c) Institute of Competition Law, 2017.